Bills Committee on Companies Bill

Follow-up actions for the meetings held on 16 December 2011 and 6 January 2012 in relation to Part 12 of the Companies Bill

Purpose

This paper sets out the Administration's response to the issues raised by Members at the Bills Committee meetings on 16 December 2011 and 6 January 2012 relating to Part 12 (Company Administration and Procedure) of the Companies Bill ("CB").

Administration's response

Clauses 539 (Power to propose written resolution) and 542 (Company's duty to circulate written resolution proposed by members)

2. Members suggested that we follow the United Kingdom ("UK") in setting the threshold for proposal and circulation of written resolutions at 5% of the total voting rights of members, and sought information on relevant requirements in Australia and Singapore.

3. The current threshold of 2.5% is adopted from the threshold for proposing a resolution in an annual general meeting ("AGM") under section 115A(2)(a) of the Companies Ordinance ("CO"), which is restated in clause 605(2)(a). It also aligns with the threshold for circulation of members' statements in a general meeting (clause 570(2)(a)). However, having considered that the threshold for calling a meeting is 5%, and taking into account Members' views, we are prepared to raise the threshold to 5%. By comparison, the thresholds in UK and Singapore are both 5%, while no threshold is specified in Australia.

Clause 544 (Application not to circulate accompanying statement)

4. Members sought clarification on what would constitute an abuse under clause 544(1). In this regard, the test in the corresponding section

(section 115A(5)) of the CO is whether the rights are being abused to secure needless publicity for defamatory matter. In line with section 295 of the UK Companies Act 2006 ("UKCA 2006"), we have widened the scope of abuse in clause 544. "Abuse" in clause 544 is to be interpreted in accordance with its ordinary meaning. The dictionary meaning of "abuse" includes "make a bad or wrong use" of something. It may be argued that a member may have abused the right to make the statement if the statement is of marginal relevance to the company's main activities[1] or if it is given in bad faith or in pursuit of any private or collateral interest.[2] However, the court might not regard the right as being abused where dissemination of the information is in the interest of shareholders.[3]

5. The concept of "abuse" also appears in some other clauses in the CB, e.g. clause 454(5). For further information, please refer to paragraphs 8 to 10 of LegCo Paper No. CB(1)1184/11-12(02).

Clause 547 (Agreement signified by eligible members who are joint holders or shares)

6. Members suggested that, even if the senior holder did not signified agreement to a proposed resolution, as long as one of the other joint holders did, all joint holders should be regarded under clause 547 as having signified their agreement. In this regard, our intention is in line with Members' suggestion and we will review the drafting of clause 547(1) to see if it is necessary to clarify our intention. In any case, clause 547(1) only has effect subject to any provision of the company's articles.

Clause 552 (General provisions)

7. Clause 552(1) states that a resolution is validly passed if it is passed in accordance with provisions in the CB and the company's articles, Members sought clarification on whether the CB or the articles would prevail in case of conflict. Taking into account Members' views, we would provide that, except for those specific provisions which are

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1 See annotation to section 377(3) on page 727 of the Annotated Guide to the Companies Act 1985 by Brenda Hannigan Butterworths, 2001.

2 See *Jarvis plc v Ors v PricewaterhouseCoopers* (a firm) [2001] BCC 670 paragraph 14 at page 676.

3 *Jarvis*, supra.

expressly stated to be subject to a company's articles or which expressly state the articles may provide otherwise, the CB shall prevail over the articles in case of conflict.

Clause 554 (Special resolution)

8. It was suggested that the drafting of clause 554(2) should be reviewed to see if it was clear that it referred to 75% of the total votes casted by members and proxies, but not 75% of the votes casted by members and 75% of the votes casted by proxies. In this regard, clause 554(2) is modeled on section 283(4) of the UKCA 2006. While we consider that the drafting is clear, we will further review this clause to see if it should be revised.

Subdivision 4 (Calling Meetings)

9. Members asked if there should be provisions on directors' meetings and whether members should be given the right to request for change of time and venue of a general meeting. In this regard, we do not consider it necessary to dictate to such a detailed level a company's internal management, as the intention of the CB is to provide a general framework for companies to hold meetings without over regulation. Other major common law jurisdictions, like the UK, Australia and Singapore, also do not have detailed provisions on meetings of members and directors. Specific and detailed requirements tailored to suit the needs of individual companies can be provided in the articles if it is considered necessary.

Clauses 555 (Directors' power to call general meeting), 556 (Members' power to request directors to call general meeting) and 646 (Form of company records)

10. Taking into account Members' views, we will propose Committee Stage Amendments ("CSAs") to delete "一眾" in the Chinese version of clauses 555, 556 and 646. After the amendments, it would be clear that "董事" in clauses 555, 556 and 646 refer to the board of directors.

Clause 561 (Notice required of general meeting)

11. Members suggested that the threshold for agreeing to a shorter notice for calling meeting should be raised to 100%. In this regard, the consent of a majority in number of all the members having voting rights, representing 95% of the total voting rights is considered a sufficient safeguard for protection of minority shareholders' interests. In fact, because of the need for a majority in number as well as voting rights which, on particular facts, might in effect require unanimity, the provision is of limited use.[4] However, for business facilitation, it will be of use to small private companies with a few shareholders, subsidiaries or family controlled companies where, for example, it is necessary to obtain members' approval for an imminent transaction or to meet a deadline.

12. We note that, in the UK, the requisite percentage is 95% for public companies and 90% or such higher percentage (not exceeding 95%) for private companies (section 307(6) of the UKCA 2006). In Australia (section 249H(2) of the ACA) and Singapore (section 177(3)(b) of the Singapore Companies Act ("SCA")), the percentage is 95%. As the threshold in the CB, which is in line with those in other jurisdictions, is already very high, we do not consider it appropriate to tighten the requirement further to 100% members' approval.

Clauses 569 (Accidental failure to give notice of meeting or resolution) and 606 (Company's duty to circulate resolution for annual general meeting)

13. Members sought clarification on the interpretation of "accidental failure". In this regard, "accidental failure" is based on section 115A(6) and regulation 53 of Table A of the First Schedule, which provides that "accidental omission" to give notice is to be disregarded. The use of "accidental failure" is in line with section 313 of the UKCA 2006, although it is noted that "accidental omission" is used in Australia (section 1322(3) of the ACA) and Singapore (section 183(6) of the SCA). "Accidental omission" appears in Clause 606(3) in relation to notice of a members' resolution to be moved at an AGM.

[4] See annotation to section 369(3), (4) on page 711 of the Annotated Guide to the Companies Act 1985 by Brenda Hannigan Butterworths, 2001.

Case on "accidental failure"

14. In *Re Halcrow Holdings Ltd.*[5] an accidental failure to notify some of the shareholders of a company meeting through the provision of documents relating to a proposed scheme of arrangement within the statutory timeframe was waived under section 313 of the UKCA 2006 and the company's articles of association where the attempt to give notice had been genuine.[6]

Cases on "accidental omission"

15. In *Peninsular and Oriental Steam Navigation Co v Eller*,[7] the company had given correct instructions to the share registrars but the instructions were not carried out correctly by the registrars. The court held that the failure to serve some of the stockholders in time owing to the registrar's error was an accidental omission. Another example is in the case of *Re West Canadian Colleries Ltd*[8] where notice of the general meeting was inadvertently not sent to a small number of members. However, in *Musselwhite v Musselwhite & Co. Ltd*[9], a deliberate failure to provide notice of a general meeting to some members based on the company's solicitor's mistaken opinion that they were no longer members of the company was not regarded as an "accidental omission". The authorities indicate that only failures or omissions that are, from the company's point of view, unintentional or unattributable to the company would be waived.[10]

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5 Unreported, Chancery Division 9 November 2011.

6 The error was in the execution of the printing of the scheme documents and there was no desire or intention not to send all shareholders the scheme documents; it was the clear intention of the solicitors to notify all of the shareholders and the attempt to give notice was genuine: the failure in the execution of that attempt was accidental.

7 [2006] EWCA Civ 432. The company was incorporated by royal charter and the company's charter provided that the accidental omission to give notice to or the non-receipt of a notice by a stockholder would not invalidate proceedings at a meeting. The court of appeal held that the company and its solicitors had taken the decision to proceed in the correct way and they gave instructions accordingly. The error in giving effect to the correct instructions was not attributable to the company and could properly be characterized as an accidental omission.

8 [1962] Ch 370. The address details of those members had been taken out of the mailing list arrangements that were set up on a previous mailing occasion, for entirely innocuous reasons, but should have been put back for the purposes of the notice of the meeting. That was inadvertently overlooked at the time of giving notice of the meeting and the details were not added back, so the members did not receive their notices.

9 [1962] Ch 964. The members had sold their shares but the purchase price had not been fully paid and the members' names remain on the register of members.

10 Paragraph 56 of the judgment in *Peninsular and Oriental Steam Navigation Co v Eller*

16. We note that "accidental failure" is very similar to "accidental omission". In the *Halcrow Holdings* case, the court followed the Court of Appeal's decision in the *Peninsular and Oriental Steam Navigation* case as to what constitutes "accidental failure" in section 313(1) of the UKCA 2006 even though the latter case is concerned with an "accidental omission" to give notice. Currently, most English company law texts still cite the *West Canadian Collieries* case in their commentary on section 313(1) of the UKCA 2006 even though that case is concerned with "accidental omission". Given their similarity, we propose to align the use of the two terms in the CB. Subject to Members' views, "accidental omission" in clause 606(3) would be amended to "accidental failure".

Clauses 570 (Members' power to request circulation of statement) and 605 (Members' power to request circulation of resolution for annual general meeting)

17. Members asked whether the threshold of 2.5% in clause 570(2)(a) and 605(2)(a) should be raised and whether the reference to the average sum paid up per member at $2,000 in clause 570(2)(b) and 605(2)(b) should be deleted.

18. The threshold proposed in clause 570(2) is in line with the threshold in section 605(2) for circulation of a members' resolution for an AGM, which restates section 115A(2) of the CO. We do not see any major problem with the current 2.5% threshold and do not propose any change. However, we agree with Members that the threshold of 50 members is sufficient and there appears no need to maintain the requirement on average sum paid up per member. We would propose CSAs to remove the requirement on average sum paid up per member in clauses 570(2)(b) and 605(2)(b). This is in line with sections 249P and 249N of the ACA.

Clause 574 (Meeting at 2 or more places)

19. Having regard to the relevant provisions in the UK and Australia, Members suggested replacing "audio-visual" with "electronic means" or other words to that effect so as to give more flexibility to companies. Members also asked if it would be necessary to make regulations on the procedures for conducting meetings at 2 or more places.

20. "Audio-visual" in clause 574(1) is taken from *Byng v London Life Association Ltd*[11] where it was held that a general meeting could take place in more than one room with adequate audio-visual links to enable everyone attending to see and hear what is going on in all the rooms being used. We note that, in the UK, section 360A of the UKCA 2006[12] provides that nothing in Part 13 of the UKCA 2006 (Resolutions and Meetings) is to be taken to preclude the holding and conducting of a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it. In Australia, section 249S of the ACA provides that a company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate. Taking into account Members' suggestion, we would consider introducing a CSA to replace "audio-visual" with "electronic means" or "technology".

21. However, we do not intend to regulate the procedures for conducting dispersed meetings (e.g. on the arrangements for verifying attendance). The procedures may change as technology evolves. It would therefore be best to leave it to the companies to make their own rules according to their needs and circumstances.

Clause 579 (Votes of joint holders of shares)

22. Members asked, if the senior holder did not vote, whether the vote of the other joint holders would be counted. In this regard, clause 579(1) states that only the vote of the senior holder who votes may be counted. It is clear that, if the senior holder does not vote, the vote of the next most senior holder who votes may be counted. In any case, clause 579(1) has effect subject to any provision of the company's articles.

Clause 581(2) (Right to demand poll)

23. In view of the relevant threshold of 10% in the UK and Singapore, Members asked the Administration to review the threshold of 5% in clause 581(2) of demanding a poll.

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11 [1989] 1 All ER 560.

12 Added pursuant to section 8 of The Companies (Shareholders' Rights) Regulations 2009.

24. Compared to section 114D of the CO, the threshold for demanding a poll based on a percentage of the total voting rights is reduced from 10% to 5% in line with the threshold for members' requisition for an extraordinary general meeting in clause 556(2), which restates section 113 of the CO. The threshold of 5% in section 113 of the CO was enacted in 2000 pursuant to a recommendation in the Consultancy Report on Review of the Hong Kong Companies Ordinance to facilitate shareholders holding a small percentage of voting shares to call a meeting with a view to promoting accountability of management to shareholders.

25. While we note that the threshold for demanding a poll in the UK and Singapore is currently 10% of the voting rights, we note that there is a recommendation recently made by the Steering Committee to Review the Singapore Companies Act that the threshold be lowered to 5%. Among others, the Committee considered that –

(a) lowering the threshold could enhance standards of corporate governance;

(b) a lower threshold, especially for a private company which had limited number of shareholders, would enable a minority shareholder to better exercise his rights and would be consistent with the threshold in respect of the right of a member to require a general meeting to be convened instead of proceeding with a written resolution; and

(c) as shareholders holding less than 10% voting power could already ask for a poll under the alternative five-member threshold, there is no compelling reason to maintain the height of the voting rights threshold at 10%.[13]

26. The threshold in clause 581(2), while lower than that in the UK, tallies with that for members' requisition for a general meeting in clause 556(2) and is in line with the position in Australia and the recent recommendation in Singapore. We therefore propose to retain the 5% total voting rights threshold.

[13] Recommendation 2.2 and paragraphs 8 to 10 of Chapter 2 of the Report of the Steering Committee published on 20 June 2011.

Clause 600 (Requirement to hold annual general meeting)

27. Members suggested that the Registrar of Companies ("Registrar"), instead of the Court, should be empowered under clause 600(5) to extend the period for a company to hold an AGM. Similarly, the Registrar should be empowered to extend the period for laying or circulating financial statements and reports.

28. The court may give directions (including ancillary and consequential directions) where there is default in holding an AGM, and for laying accounts before that meeting under sections 111(2) and 122(1B) of the CO. The court has wide powers to give directions relating to the supervision of the process and has frequently exercised the power to regularize non-compliance which may have continued for periods as long as 10 years. The court will regularize non-compliance if it is satisfied on evidence that there is no wilful default on the part of the company, that no prejudice has been caused to the shareholders and that measures have been taken by the company to ensure that there would be compliance with the statutory requirements in the future: *Yu Sun Say v HKI Properties Ltd*[14]. As not all applications are non-contentious and some may involve complicated issues of fact and law and may include relief sought under other sections of the CO[15], we consider the court is the appropriate forum to adjudicate the issues concerned and is better equipped to give directions on all the matters arising from such applications.

29. As the period for holding an AGM is aligned with that for laying or circulating annual financial statements and reports, for expediency, applications for extension of time for such purposes should be dealt with exclusively by the court, as provided in clauses 420(1), 422(1), 600(5) and (7). We therefore propose no change to clause 600(5). This is in line with the position in the UK, where the Companies House has no power to authorize an extension of time for holding an AGM (section 336 of UKCA 2006).

Clauses 608 (Records of resolutions and meetings, etc.) and 617 (Register of members)

30. Members asked the Administration to consider whether the

[14] HCMP 2556 to 2561, 2563, 2565 to 2568 of 2007.

[15] For example relief under section 114B (Power of court to order meeting) of the CO as in In the matter of *Grand Hill Enterprises Limited* HCMP 2456/2009.

period for keeping records of resolutions and meetings, etc. in clause 608 and the period for keeping a former member's entry on the register of members in clause 617 should be shortened.

31. For the requirement to keep records of resolutions and meetings, etc. in clause 608, the current CO is silent on the period, as is the position in Australia and Singapore. Section 355(2) of UKCA 2006 introduces a 10 year minimum period for keeping records of resolutions, meetings or decisions of sole members. Clause 608(2) is modeled on that but the period is 20 years, in line with the period for retaining the register of former members in clause 617(5). Taking into account Members' concern that the 20-year period is too long and that accounting records are only required to be kept for seven years (clause 373(2)), we would introduce a CSA to change the period of 20 years in clause 608(2) to 10 years, in line with section 355(2) of UKCA 2006.

32. As for the requirement to keep a former member's entry, currently section 95(1)(ii) of the CO provides that entries relating to a former member may be destroyed after 30 years. The period is reduced in the CB to 20 years after considering various factors, including the period of 20 years for reinstatement of a company being struck off. However, taking into account Members' suggestion, and the fact that the period is 10 years (section 121 of the UKCA 2006) in the UK and seven years in Australia (section 169(7) of the ACA) and Singapore (section 190(1) of the SCA), we would introduce a CSA to change the period of 20 years in clause 617(5) to 10 years.

<u>Clauses 609 (Place where records must be kept available for inspection), 618 (Place where register must be kept available for inspection), 632 (Register of directors) and 639 (Register of company secretaries)</u>

33. Members suggested that companies should be allowed to keep its records and registers in more than one places as many companies in Hong Kong had to keep records in different warehouses. It followed that records and registers might not be available for inspection at the place where they were kept. Members also suggested that a defence be introduced that a company would not be liable for failing to provide

records for inspection due to reasons that are out of the company's control (e.g. the records had been destroyed by fire).

34. In view of Members' suggestions, and taking into account the requirements in the UK, we would consider introducing CSAs to clauses 609, 618, 632 and 639 to –

(a) allow a company to keep its records and registers at more than one place in Hong Kong;

(b) allow inspection to take place at a place other than the place(s) at which the records are kept, provided that there should be no more than one inspection place; and

(c) in addition to the requirement to notify the Registrar of the place(s) where records and registers are kept, a company is also required to notify the Registrar of the inspection place.

35. With regard to the defence for failure to provide records for inspection due to reasons beyond the company's control, we consider that, since mens rea is required to be proved beyond reasonable doubt for prosecution of a "responsible person" in order to secure a conviction, it is not necessary to provide a statutory defence in respect of matters beyond the company's control.

Clause 619 (Statement that company has only one member)

36. Members suggested that there should be a specific period for a company to insert the information required in clause 619 in its register of members so as to facilitate compliance and enforcement. In this regard, clause 619 is based on section 95A of the CO which does not provide for a time for inserting the statement in the register of members. In the absence of a specified time, the act must be done without unreasonable delay (section 70 of Cap 1). However, we agree that a specified period would facilitate compliance and enforcement. Taking into account that a company already has two months to register a transfer/transmission of shares under clause 146(2) or clause 153(2), the time to make the

statement in the register should be soon after, if not contemporaneously. We propose to specify a period of 15 days.

Clause 620 (Index of members)

37. In the light of Members' suggestion, we will introduce a CSA to change the period of 7 days to 15 days, in line with the provisions relating to delivery of documents to the Registrar for registration.

Clause 626 (Register to be proof in the absence of contrary evidence)

38. Noting that clause 626(2) followed section 102(2) of the CO, Members asked whether there was case law on section 102(2) of the CO. Members were concern that clause 626(2) might prejudice the rights of shareholders, and asked whether the period of 20 years provided in the CB should be reverted back to 30 years as in the CO, or be removed so as to leave it to the court to decide.

39. Section 102(2) of the CO was added when section 95 of the CO was replaced by new provisions which provide a period of 30 years for keeping records of former members. Section 102(2) was added then to relieve companies of the need to preserve records of transactions dating back to more than 30 years.[16] We are unable to find any authorities on the application of section 102(2) of the CO. Neither is there any comparable provision in the UK.

40. In view of Members' concern, we propose to delete clause 626(2). This would remove any limitation on admissibility of evidence for the purpose of rectification of the register by the court.

Clause 646 (Form of company records)

41. Members suggested reviewing the wording of clause 646(4) to ensure that inspection by electronic means would be allowed. We agree

[16] Explanatory Memorandum of Companies (Amendment) Bill 1984 re clause 65.

that inspection by electronic means should be permitted if the parties agree and will introduce a CSA to provide that clause 646(4)(a) and (b) would be subject to the parties' agreement.

Section 108 (Supplementary provisions relating to particulars to be registered) of Schedule 10 (Transitional and Saving Provisions)

42. In response to Members' suggestion, we will introduce a CSA to amend the clause to make it clear that a "shadow director" refers to a shadow director deemed to be a director under section 158(10)(a) of the CO.

Section 110 (Particulars to be registered) of Schedule 10 (Transitional and Saving Provisions)

43. Members asked if the address of the company secretary's office would be deemed to be the correspondence address. In this regard, the deeming provision does not apply to the office address of a body corporate or a firm. It only applies to a company secretary who is an individual whose residential address is required to be entered in the company's register of directors and secretaries under section 158(3)(a) of the CO.

Financial Services and the Treasury Bureau
Companies Registry
9 March 2012